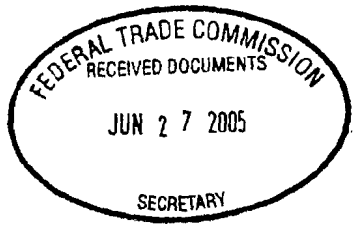
Microsoft Corporation
One Microsoft Way
Redmond, WA 98052-6399

Tel 425 882 8080
Fax 425 936 7329
http://www.microsoft.com/

Microsoft

June 27, 2005

VIA HAND DELIVERY



Mr. Donald S. Clark
Secretary
Federal Trade Commission
Room 159-H
600 Pennsylvania Avenue, NW
Washington, DC 20580

RE: CAN-SPAM Act Rulemaking, Project No. R411008

Dear Secretary Clark:

Microsoft submits these comments in response to the Commission's Notice of Proposed Rulemaking (NPRM) dated May 12, 2005, to assist the Commission in developing regulations to implement provisions of the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (the "CAN-SPAM Act" or "Act"). Like other providers of Internet access and e-mail services, our top priorities are ensuring that our customers feel comfortable using e-mail to communicate and that e-mail remains a viable medium for business and personal communications. For these reasons, Microsoft supported passage of the CAN-SPAM Act, and we are committed to working with the Commission, law enforcement, and other industry members to address the spam problem.

Microsoft appreciates your consideration of our comments in response to the Advanced Notice of Proposed Rulemaking (ANPR) and welcomes the opportunity to provide these comments. We have focused these comments on four areas identified in the Commission's NPRM that we believe are critical to ensuring that the CAN-SPAM Act helps consumers control the types of commercial messages they receive, provides clarity for legitimate companies that seek to use e-mail responsibly, and captures illegal tactics employed by spammers to avoid detection.

- *First*, we urge the Commission to clarify certain aspects of the definition of "sender." Specifically, the Commission should clarify that an entity "controls" the "content" of a commercial message only when it has control over the overall message – and not merely control of any component part or parts of the message. Moreover, the Commission should make clear that, in the multiple advertiser scenario, there is a low threshold to satisfy the standard for what constitutes "advertising" or "promoting" an entity's product or service – which is a requirement to be deemed a "sender" under the Act – so that a list owner to

which the recipient would expect to be able to direct an opt-out request may, in fact, be considered the sender.

- *Second*, we urge the Commission to clarify the proposed prohibition on charging a fee or imposing other requirements on recipients who wish to opt out. Specifically, the Commission should affirm that while unreasonable barriers should be prohibited, in some cases it is permissible, or even desirable, that: a password or other credential be provided in order to opt-out; more than one web page be presented when the consequence of opting out may not be fully understood; and a benefit may be denied as a consequence of opting-out.
- *Third*, we urge the Commission *not* to reduce the time for honoring an opt-out request from the ten-business-day period established by Congress to three business days.
- *Fourth*, we urge the Commission to clarify that, in the context of forward-to-a-friend messages, merely offering "inducement" other than actual consideration – such as encouraging words on a website – does not take the seller outside the scope of the "routine conveyance" exception.

I. THE COMMISSION SHOULD CLARIFY ASPECTS OF THE DEFINITION OF THE TERM "SENDER" - § 316.2(m).

The CAN-SPAM Act imposes heightened obligations on "senders" of commercial e-mail messages: they must honor recipient opt-out requests; they must include a mechanism by which a recipient can opt out of future e-mails in every such message; and they may not initiate a commercial e-mail message to recipients who have previously opted out of receiving their messages. When a particular e-mail contains advertisements for multiple entities – which is now the norm for many commercial e-mail communications – these obligations would quickly become unwieldy if all advertisers were deemed separate senders of the message. As Microsoft noted in response to the Commission's ANPR, a message for which there were multiple senders would require a separate pre-transmission opt-out list scrub by each sender, a distinct opt-out notice and mechanism for each sender, and potentially the transfer of recipient e-mail addresses and preferences among numerous and diverse parties. As we explained, this would add cost and complexity, undermine user choice and control, and create security vulnerabilities with respect to the transmission of most commercial e-mail.

The Commission recognized these problems in the NPRM, and noted that to avoid "placing undue compliance burdens on businesses and endangering the privacy of consumers' personal information . . . the definition of 'sender' should be modified so that in situations when one or more person's products or services are promoted in a single e-mail message, those sellers may structure the sending of the e-mail so that there will be only one sender of the message for purposes of the Act." Specifically, the Commission proposes modifying the definition of "sender" as follows:

> "(m) The definition of the term "sender" is the same as the definition of that term in the CAN-SPAM Act, 15 U.S.C. 7702(16), provided that, when more than one

person's products or services are advertised or promoted in a single electronic mail message, each such person who is within the Act's definition will be deemed to be a "sender," except that, if only one such person both is within the Act's definition and meets one or more of the criteria set forth below, only that person will be deemed to be the "sender" of that message:
(1) The person controls the content of such message;
(2) The person determines the electronic mail addresses to which such message is sent; or
(3) The person is identified in the "from" line as the sender of the message."

This proposed definition offers a solution to many of the problems that could potentially arise under the definition used in the Act, and Microsoft greatly appreciates the Commission's effort to provide guidance and address the challenges posed by situations in which a single e-mail message could be seen as having multiple "senders" under the Act. That said, there are two issues with the language that should be addressed:

- First, the Commission should clarify that an entity "controls" the "content" of a commercial message only when it has control over the overall message – and not merely control of any component part or parts of the message.
- Second, the Commission should make clear that, in the multiple advertiser scenario, there is a low threshold to satisfy the standard for what constitutes "advertising" or "promoting" an entity's product or service – which is a necessary requirement to be deemed a "sender" under the Act – so that a list owner to which the recipient would expect to be able to direct an opt-out request may, in fact, be considered the sender.

Failure to clarify the proposed rule on either of these points could undermine the Commission's attempt to effectively address the multiple advertiser scenario.

A. "Control" of the "Content" Means Control over the Overall Message.

The first potential pitfall under the proposed rule is the requirement that where multiple entities have their products or services promoted in a message, only one of those entities may "control[] the content of such message" to be designated the sole sender. Obviously, where there is content advertising more than one person's products or services in a single message, each advertiser will have some control over some amount of the content in the e-mail (e.g., the look of its own trademarks, how those trademarks are used, and the description of its products). But this should not be sufficient to constitute "control" of the "content" under proposed section 316.2(m)(1); if it were, every advertiser would still be considered a sender, which would defeat the purpose of the proposed rule. Instead, the Commission should make clear that "control" of the "content" means control of the content of the overall message – for example, the integration of the various pieces of the message; the look and feel of the full layout; and the right of last refusal before transmission of the full message. Under this standard, only one entity may control the content of a commercial e-mail message – the entity that has the responsibility for assembling the component pieces into a full e-mail and the authority to decide when the message is final and ready to be transmitted.

This interpretation is consistent with the notion of a sender, because the entity that performs these tasks is generally the entity to which a recipient would reasonably expect that opt-out requests should be directed (assuming that entity and its role are apparent). In contrast, a broader interpretation of "control[] the content" to include responsibility for any of the content in a message would be inconsistent with the concept of a single "sender" and would plainly subvert the Commission's intent in creating this flexible approach.

As Microsoft and others explained in response to the ANPR, and as the Commission appears to have recognized in the NPRM, "when consumers have subscribed to an online newsletter or similar service, they would expect to submit an opt-out request to that newsletter publisher, not to each advertiser in the newsletter."[1] In this newsletter example, each advertiser would, by definition, have provided some content for use in the newsletter – for example, the advertiser's logo, an advertising slogan, or text describing the advertiser's product. It would be inconsistent to find that any of these advertisers that contribute this material "control the content" of the overall message under the Proposed Rule. Further, a recipient opting out of an e-mail newsletter that contained advertisements for various companies would reasonably intend to opt out of receiving the newsletter in the future, not to opt out of receiving messages from one of the underlying companies whose products are advertised in the newsletter. Indeed, this rationale also supports another factor in the Commission's proposed definition of "sender" – which entity determines the list of recipient e-mail addresses – because it is the entity that controls the mailing list to which a consumer would reasonably expect an opt-out request would and should flow.

The proper and internally consistent interpretation – and the interpretation that the Commission should clarify that it proposed in its NPRM – is therefore that only the single entity that has overall control over the message's content, is responsible for assembling the component pieces, and has final authority to decide whether the message is ready to be transmitted "controls the content" of that message under the Proposed Rule. The Commission should therefore clarify section 316.2(m)(1) accordingly.

B. The Threshold for What Constitutes "Advertising" a Product or Service in a Message with Multiple Advertisers Should Be Low.

The Commission should also clarify that, in the context of a message with multiple advertisers, the standard for what constitutes "advertising" a product or service to be deemed a sender should be interpreted broadly with respect to the list owner. This is critical to avoid the situation where a list owner meets most, or even all, of the proposed criteria of § 316.2(m) (i.e., controls the content of such message, determines the electronic mail addresses to which such message is sent, and is identified in the "from" line as the sender of the message) yet still would not be considered the "sender." Such a result would clearly be contrary to the expectations of the recipient, and would permit list owners who wish to hide their role and/or rely on a technicality in the proposed rule to *never* give users the opportunity to get off of their lists. This would also enable list owners to behave

[1] 70 Fed. Reg. 25426, 25429-30 (May 12, 2005).

deceptively by determining the electronic mail addresses to which a message is sent but offering opt-out choices only for the other entities that advertised in the message but did not control the mailing list. This would likely mislead recipients of the mail as to why they received the mail, and the effect of exercising the opt-out choice(s) presented in the mail.

In order to prevent such a result, the Commission should make clear that when a commercial e-mail message is sent by a list owner, it would constitute a deceptive trade practice for the list owner to fail to identify itself and the role that it plays in sending the message. By doing so – and by adopting a sufficiently broad standard for what constitutes "advertising" in this context – the Commission can ensure that when the list owner identifies itself and the service it is providing, that list owner could be seen as advertising or promoting its own services and could therefore be considered the "sender" under the language of the Act. This will ensure that recipients will be able to notify the list owner that is the true "source" of the message that they no longer wish to receive commercial e-mails from that list owner.

II. THE COMMISSION SHOULD CLARIFY THE PROPOSED PROHIBITION ON CHARGING A FEE OR IMPOSING OTHER REQUIREMENTS ON RECIPIENTS WHO WISH TO OPT OUT - § 316.5.

Proposed section 316.5 would broadly prohibit senders from imposing any fee, requiring recipients to provide more personal information, or imposing other obligations in connection with an opt-out request. Microsoft unequivocally supports the intent of this provision – and generally supports its application. We do, however, believe that the Commission should clarify two aspects of this prohibition.

A. The Commission Should Not Prohibit the Use of Passwords and Other Authentication Mechanisms To Access Account Settings.

The Commission should clarify that the use of a password or other form of authentication is appropriate in connection with an opt-out request in some cases. In particular, we urge the Commission to avoid adopting a blanket rule that would prohibit senders from requiring the use of an authentication mechanism in connection with exercising opt-out requests under the Act.

We agree with the Commission that to the extent that the Act is intended to protect individual privacy, it would be a "subversion" of that intent to require a recipient to disclose personally identifying information to the sender that the sender does not already have in order to exercise an opt-out right.[2] Similarly, it makes good sense to establish a rule that would prohibit a sender from requiring a recipient to *create* an account or *establish* a username/password or other authentication credential in order to exercise an opt-out choice, because such a requirement would constitute an unreasonable obstacle.

However, in cases where there is an ongoing relationship with regular interactions between the sender and recipient, and such interactions are based on the use of an existing password

[2] 70 Fed. Reg. at 25445.

or credential, requiring a user to provide such credential in order to manage his or her account – including his or her communications preferences – does not create an unreasonable obstacle. Moreover, such a process for opting out does not require the disclosure of any information that the sender does not already possess, and thus in no way undermines the privacy protections that are at the heart of the Act.

Indeed, any opt-out mechanism that does not rely on an authentication credential is subject to being manipulated in ways that would potentially allow somebody other than the recipient to opt the recipient out of receiving e-mail. Whether due to mischief or unethical competitors, such actions could cause significant harm to both sender and recipient. For example, a recipient may be a business partner of the sender, such as a reseller of the sender's products, whose business relies on receiving and making use of the sender's promotions.

Thus, we urge the Commission to clarify that requiring customers to use an existing password or other existing credential in order to exercise their opt-out rights does not violate the prohibition on providing "any information" other than an e-mail address. Further, in such cases, having a sign-in page followed by a subsequent webpage on which a recipient can exercise his or her communications preference choices should not be considered a requirement to visit more than "a single Internet Web page."

The next section highlights additional opt-out situations where authentication and more than a single web page may be appropriate.

B. Depriving Recipients of a Benefit Should Be Deemed Acceptable In Some Cases.

In response to a question in the NPRM,[3] we also urge the Commission not to adopt a prohibition on depriving recipients of a benefit in connection with an opt-out. Such a prohibition would have severe unintended consequences on user choice and control.

As the Commission is aware, many online services are made available to users at no monetary cost (or a reduced cost) in exchange for an agreement to receive targeted advertising – including the receipt of commercial e-mail messages. These business models rely on advertising revenue and/or cross-promotional opportunities to fund these services, which otherwise might not be made available to consumers (or would be significantly more expensive for consumers).

Where agreeing to receive such commercial e-mail is a condition of the service, the recipient of the message should always be able to stop its delivery in the future, but he or she should not expect to continue to receive the free or discounted service. To conclude otherwise would essentially prohibit the business model of offering a benefit in exchange for agreeing to receive commercial e-mail. The Commission should not limit consumer choice in that manner.

[3] "Should depriving recipients of a benefit when they opt out be added to the list of encumbrances prohibited by this proposal?" 70 Fed. Reg. at 25451.

Further, where the effect of exercising an opt-out choice would mean the cancellation of a service, it is essential that authentication be required before that choice may be exercised. If, for example, exercising the choice may result in a service being terminated, technical precautions must be in place to prevent a person other than the actual recipient from taking the action. As discussed in the previous section, in these situations, the user already has a password or other authentication credential, and therefore would not be required to provide information that the sender does not already possess. Thus, the only privacy impact on consumers of these authentication steps is positive – to protect the privacy of, and their control over, their account information and preferences.

It is also reasonable in these cases to have an opt-out process that involves more than one web page. For example, if exercising the opt-out choice would result in the loss of a service or other benefit on which the user relies, or the loss of user data stored by such a service, it would be unwise to have a process that could result in a user taking such an action without fully understanding the consequences. Thus, providing notice to users and then asking them to confirm their decision (e.g., "are you sure?") is not only reasonable in such cases, but should be deemed a recommended best practice.

III. THE COMMISSION SHOULD NOT REDUCE THE TIME FOR HONORING AN OPT-OUT REQUEST TO THREE BUSINESS DAYS.

The NPRM also proposes reducing the time for honoring opt-out requests from ten to three business days. Microsoft asks the Commission to reconsider this revision. The ten-day period established by Congress is a reasonable period of time to respond to an opt-out request: it sufficiently protects consumers from unwanted e-mail while allowing legitimate businesses the necessary time to gather, process, and implement these requests. In contrast, there is simply no evidence in the record to support an arbitrary reduction in the timeframe to three business days.

The Act allows the Commission to modify the ten-business-day period only if it determines that an alternative timeframe "would be more reasonable after taking into account the purposes [of the relevant requirements of the Act]; the interests of recipients of commercial electronic mail; and the burdens imposed on senders of lawful commercial electronic mail." 15 U.S.C. § 7704(c). The proposed reduction to three business days is not "more reasonable" than Congress' ten-day standard under any of these three prongs.

A. The Purposes of the Act – And of Section 5(a) In Particular – Do Not Support a Reduction in the Time Period.

The opt-out requirements of CAN-SPAM were drafted to address the problems posed by entities that "provide no such 'opt-out' mechanism, or refuse to honor the requests of recipients not to receive electronic mail from such senders in the future, or both."[4] The legislative history of the Act shows that Congress considered the question of the proper timeframe for honoring opt-out requests and determined that a period of ten business days was appropriate – particularly given the complexity of exchanging opt-out information in

[4] 15 U.S.C. § 7701(9).

instances where the underlying sender does not physically transmit a message. As the Senate Report notes in the broader context of the opt-out requirements, "persons providing e-mail marketing services [are] responsible for making a good faith inquiry of their clients (the senders, under the definitions of this bill) to determine whether there are recipients who should not be e-mailed because they have previously requested not to receive e-mails from the sender."[5] The timeframe set in the opt-out requirement of the Act was therefore intended to enable businesses to implement reasonable procedures to protect and honor the privacy preferences of consumers.

Reducing the time for honoring opt-out requests to just three business days goes far beyond this standard. In fact, the statutory ten-business day requirement is already significantly shorter than compliance windows in analogous contexts. For instance, the Commission's own highly successful telemarketing rules require that additions to the national Do-Not-Call Registry be honored within 31 days,[6] and the Federal Communications Commission ("FCC") mandates that company-specific do-not-call requests generally be honored within 30 days.[7] Even under CAN-SPAM, the one analogous requirement is also substantially longer and in line with the timeframes in the telemarketing context: absent express prior authorization, the FCC prohibits initiating a commercial e-mail message to a wireless domain only if that domain has been identified on the FCC's applicable list for at least 30 days.[8]

In each of these cases, the timeframe was designed to balance the privacy interests of consumers with the need to avoid putting unreasonable and costly burdens on legitimate businesses. In contrast, a three-business day timeframe for honoring opt-outs is unprecedented, and, as described below, would impose an inordinate burden on legitimate businesses that is unnecessary and unjustified.

B. The Record Demonstrates That a Reduction to Three Business Days Would Have at Most a *De Minimis* Impact on Recipients But Impose a Significant Burden on Businesses.

The proposed reduction in the opt-out timeframe also fails the Act's balancing test. First, reducing the time for honoring opt-outs from ten to three business days would have at most a *de minimis* impact on recipients.

The concern expressed by some commenters regarding the potential for "mail-bombing" during the opt-out grace period is unsupported. Microsoft is in a unique position as an ISP and leading prosecutor of chronic spammers to determine whether such mail-bombing occurs, and we have not seen any cases of senders flooding recipients' in-boxes for ten days in response to an opt-out request. Moreover, such mail-bombing is unlikely to begin with, because legitimate businesses would not want to risk antagonizing consumers by using a legal technicality to bombard with unwanted messages those recipients who have

[5] S. Rep. 108-102, at 18 (2003).
[6] 16 C.F.R. § 310.4(b)(3)(iv).
[7] FCC Report and Order, Docket No. 03-153 ¶ 94 (July 3, 2003).
[8] 47 C.F.R. § 64.3100(a)(4).

affirmatively chosen to opt out. And this is consistent with the Commission's own conclusion in the NPRM: "the record does not demonstrate whether fears of 'mail-bombing' during an opt-out period are well-founded."[9] Because there is no evidence at all to support the mail-bombing theory, the Commission should not determine that the proposed reduction is in the interests of recipients under the standard set forth in the Act.

Second, reducing the time for honoring opt-outs by nearly 75 percent – from ten business days to three – would impose a significant burden on senders of lawful commercial electronic mail. As demonstrated by the comments received by the Commission in response to the ANPR, many senders can and do implement opt-out requests more quickly than ten days. However, for other senders, implementing such requests within three days may be very difficult.

As a leading provider of technology, and a company involved in our own e-mail marketing activities, Microsoft has particular insight into the challenges posted by collecting, processing and implementing opt-out requests in a complex environment. Many companies – especially large companies – have complex data systems that involve multiple databases and varying systems and processes (some internal and some managed by trusted vendors) for the delivery of e-mail communication and the handling of personal information and contact preferences. The processing of customer opt-out requests across these systems requires complex integration of these systems and processes. This complex integration coupled with large amounts of data creates challenges and limitations in terms of timing.

For example, many such large organizations manage data flow from one system to the next in batch mode.[10] Especially where complex matching, merging and standardizing of data is happening to associate common records and maintain company-wide taxonomies for integration, real-time data flow is difficult or impossible. Thus, suppose that a company has several different systems that deliver e-mail and collect resulting opt-out requests. Each of those systems must synchronize with a central process for receiving, processing and merging those requests with data coming from many other systems, and then feed the resulting up-to-date contactability status back out to all the systems from which data may be pulled to deliver a subsequent e-mail campaign.

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[9] 70 Fed. Reg. at 25444.

[10] Webopedia (http://www.webopedia.com) defines "batch processing" as follows:

"Executing a series of noninteractive jobs all at one time. The term originated in the days when users entered programs on punch cards. They would give a batch of these programmed cards to the system operator, who would feed them into the computer.

Batch jobs can be stored up during working hours and then executed during the evening or whenever the computer is idle. Batch processing is particularly useful for operations that require the computer or a peripheral device for an extended period of time. Once a batch job begins, it continues until it is done or until an error occurs. Note that batch processing implies that there is no interaction with the user while the program is being executed.

An example of batch processing is the way that credit card companies process billing. The customer does not receive a bill for each separate credit card purchase but one monthly bill for all of that month's purchases. The bill is created through batch processing, where all of the data are collected and held until the bill is processed as a batch at the end of the billing cycle.

The opposite of batch processing is transaction processing or interactive processing. In interactive processing, the application responds to commands as soon as you enter them."

Within a given infrastructure, each process takes a fixed amount of time to run. A simple example that involves two databases – one that collects contact preferences and a central one that processes, stores and manages them – is illustrative. Taking data from data base "A" and simply moving it to data base "B" will take "W" amount of time. This time will vary depending on the method of transmission. If those two databases reside in different physical locations (as is often the case), the commuting time for the data ("X") also becomes a factor, so the process will take W+X time. It takes additional time to standardize, index, match and merge data coming from many different sources into central hub systems ("Y"), and the process now takes W+X+Y time. Finally, there is the time involved in making the data from hub systems available to downstream systems ("Z"), and the overall process now takes W+X+Y+Z time.

Additionally, the fact that external (e.g., vendor systems) may be involved adds another significant period of time to the process. For example, a mailing list may be pulled from a company system, transferred securely to a vendor system, loaded, processed and then sent. And on the other end of that process – after an e-mail campaign is transmitted – the vendor may need to collect the resulting opt-out requests and send them back in batches to the company, which must then load, process, synchronize, and implement them.

Because every step in this process takes time, the full cumulative process of collecting and implementing opt-out requests can take a number of days. In order to guarantee the entire process would be under three business days, the physical limits of currently deployed systems may have to be fundamentally rearchitected – potentially at an enormous cost and with significant disruption to the business.

Many senders went to great pains to rearchitect systems and redesign processes in order to comply with the ten-day period. To now require them to go through that again – most likely in a way that would be even more costly than the first time – would be unwarranted in the absence of a compelling and urgent need. Given that we have not seen *any* cases of senders flooding recipients' inboxes for ten days in response to an opt-out request, the record indicates that there is no such need.[11]

However, were the Commission to reduce the time for honoring an opt-out request at all – whether to three business days or some other period – it should delay the effective date of that change for one year from the date of the Final Rule. It is potentially a very costly and complex task to redesign systems in order to reduce from ten business days to three the maximum lag between an opt-out request being received and suppression of that address being fully implemented across all associated e-mail delivery systems operated by the sender or by third parties operating on behalf of the sender. Thus, if the Commission were to adopt such a rule, it should give companies ample time to design, build and implement

[11] If the Commission nevertheless determines that the ten-business-day period is too long and a reduction is justified under the criteria established by Congress, we would suggest adopting a five-business-day period, which is consistent with the Australian Spam Act. To the extent that companies with global operations have to comply with the Australian standard anyway, a five-business-day timeframe may minimize the burden on at least some legitimate and responsible senders of commercial e-mail.

such changes. Off-the-shelf products that purport to make this process quick and easy may not be adequate or practical for large and complex operations that have been built around legacy infrastructure – and the Commission acknowledges that appropriate products may not yet exist.[12] We believe that a one-year transition period would therefore be appropriate.

IV. THE COMMISSION SHOULD CLARIFY THAT AN UNDERLYING SELLER IS NOT THE SENDER OF FORWARD-TO-A-FRIEND MESSAGES IN THE ABSENCE OF ACTUAL CONSIDERATION.

The central issue with regard to forward-to-a-friend features is whether a seller that offers such a feature is the "sender" of any messages that are forwarded as a result – specifically, whether the seller "initiates" that forwarded message and therefore has to comply with the Act's substantive requirements.[13] The term "initiate" means "to originate or transmit such message or to *procure* the origination or transmission of such message, *but shall not include actions that constitute routine conveyance* of such message."[14] This definition contains two additional defined terms that are key to its meaning: (1) "procure," and (2) "routine conveyance."

Under the Act, "procure" means "intentionally to pay or provide other *consideration* to, or *induce*, another person to initiate such a message on one's behalf."[15] This definition contains two critical undefined terms – "consideration" and "induce." Thus, in order for a provider of a forward-to-a-friend feature to be considered a sender of the resulting e-mail messages, the provider must provide *consideration* or otherwise *induce* the initiation of the message – as long as the provider is not engaged in *routine conveyance* of the message. "Routine conveyance" is defined in the Act as "the transmission, routing, relaying, handling, or storing, through an *automatic technical process*, of an electronic mail message *for which another person has identified the recipients or provided the recipient addresses*."[16]

We agree with the Commission's view that the term "induce" is broader the term "consideration." And we generally agree with the meanings attributed to those terms in the NPRM. However, we believe that the Commission has taken too narrow a view on the scope of "routine conveyance" in the context of Web-based forwarding mechanisms.

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[12] 70 Fed. Reg. at 25443-44.

[13] The key compliance problem raised by forward-to-a-friend e-mails is that if the underlying seller were deemed to be the sender of these forwarded messages, it would be obligated somehow to scrub every potential recipient against its database of individuals who have opted out of receiving its messages. This would be extremely challenging. Moreover, as the Commission noted, the underlying seller could potentially be liable as initiator or sender for other non-compliant aspects of the forwarded message – for example, if the initial recipient deletes the opt-out mechanism or physical postal address before forwarding the message – and would be required to collect opt-outs from recipients to whom it had never transmitted the message in the first place. *See* 70 Fed. Reg. at 25440-41.

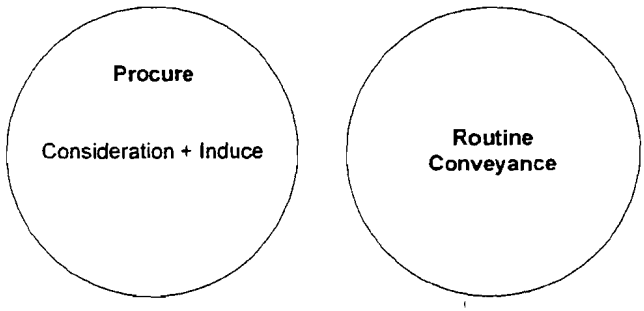
[14] 15 U.S.C. § 7702(9) (emphasis supplied).

[15] 15 U.S.C. § 7702(12) (emphasis supplied).

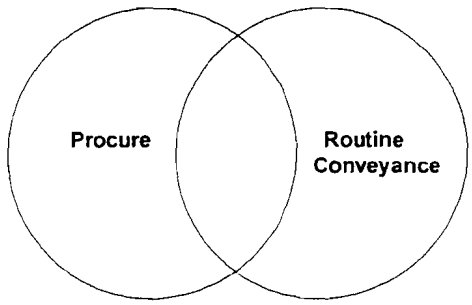
[16] 15 U.S.C. § 7702(15) (emphasis supplied).

A. The Commission Should Clarify That a Message May Be Induced or Procured But Still Fall Within the Routine Conveyance Exception to the Act's Definition of "Initiate."

In the discussion of forward-to-a-friend mechanisms in the NPRM, the Commission suggests that merely providing a link that says "click here to forward" or "e-mail to a friend," with no further encouragement, "would not likely rise to the level of 'inducing' the sending of the e-mail" and "falls within the ambit of 'routine conveyance.'"[17] The implication of this position is that *only* activities that fail to rise to the level of "inducement" could be considered "routine conveyance" in this context. The diagram below demonstrates this view – that there is no overlap between "inducement" or "procurement" on the one hand, and "routine conveyance" on the other.



This interpretation, however, is inconsistent with the plain language of the definition of "initiate" in the Act. As noted, "initiate" means "to originate or transmit such message or to procure the origination or transmission of such message, *but shall not include actions that constitute routine conveyance* of such message."[18] Under this definition, actions that constitute "routine conveyance" are *excepted* from the universe of actions that would otherwise be deemed to "initiate" a message – the two terms are *not* mutually exclusive. Thus, the Act contemplates instances where a person may have procured the origination or transmission of a commercial e-mail message, but that nevertheless would fall within the scope of the "routine conveyance" exception. The diagram below demonstrates this overlap between procurement and routine conveyance under the plain language of the Act.



[17] 70 Fed. Reg. at 25441.
[18] 15 U.S.C. § 7702(9) (emphasis supplied).

Because routine conveyance is a statutory exception from the definition of "initiate," actions that fall within the overlapping section of the circles – that constitute both procurement and routine conveyance – would be deemed instances where the underlying seller has *not* initiated a message under CAN-SPAM. Under the definition of "routine conveyance," that overlapping section includes all instances in which a person may have "procured" the origination or transmission of the message, but where: (1) that person's actions are limited to "the transmission, routing, relaying, handling, or storing, through an automated technical process, of an electronic mail message"; and (2) "another person has identified the recipients or provided the recipient addresses."[19]

B. The Commission Should Find That Absent Consideration, Forward-to-a-Friend Messages Fall Within the Routine Conveyance Exception

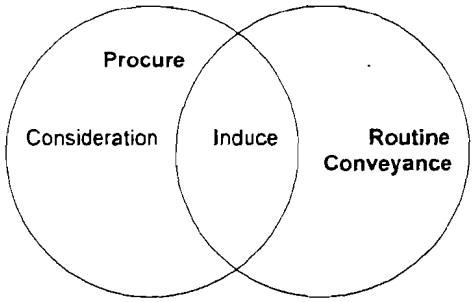
In the forward-to-a-friend scenario, "another person" always identifies the recipients or provides the recipient addresses. Thus, an underlying seller engages in routine conveyance – and therefore does not initiate – with respect to all forward-to-a-friend messages *except* those that the seller does more than just automatically transmit, route, relay, handle, or store.

The NPRM identified two distinct scenarios in which the Commission suggested that an underlying seller procured and therefore initiated a forward-to-a-friend message. First, the Commission found that an entity providing actual *consideration* for the initiation of a forwarded message had procured and thus initiated that message. We generally agree and believe that the seller in this scenario would likely have initiated the message – but only because the facts suggest more than just routine conveyance. Where consideration is involved, the seller must do more than use an automated forwarding process: the seller must track whether a particular message is sent, and then compensate the person who forwarded the message accordingly. These actions appear to exceed the scope of routine conveyance under the Act.

Second, the Commission found that an entity that *induced* – such as through an encouraging statement – a recipient to forward a message to a friend also procured and therefore initiated any subsequent messages. We agree that such an inducement likely constitutes procuring the message – but that does *not* mean the underlying seller initiated the forwarded message. Rather, this scenario falls squarely within the routine conveyance exception (i.e., the area of overlap in the above diagram). In this instance, the process established and used by the underlying seller is entirely automated: the message is transmitted, routed, and relayed automatically when the recipient clicks the forward-to-a-friend button. The substance of the language on the button itself – whether neutral "opportunity" language ("E-mail to a friend") or encouraging "inducement" language ("Tell-A-Friend—Help spread the word by forwarding this message to friends!") – makes no difference in this analysis under the plain language of the Act because the process itself is still automated. This routine conveyance trumps any inducement to send the message. As the diagram below shows, instances of procurement that do not involve the provision of actual

[19] 15 U.S.C. § 7702(15).

consideration – but rather mere inducement – therefore generally fall within the routine conveyance exception in the forward-to-a-friend context.[20]



In contrast, the alternative approach set forth in the NPRM is not supported the plain language of the Act in that it fails to recognize that an entity may induce a message but still engage in routine conveyance with respect to that message. Moreover, the Commission's interpretation creates a distinction between a mechanism that reads "Click to forward to a friend" and a mechanism that reads "Spread the word – click to forward to a friend" that is essentially meaningless in practice. Such a distinction is vague, arbitrary, and unsupported by the language of the Act – and yet under the NPRM, the latter falls within the scope of the Proposed Rule, while the former does not.[21]

In fact, the Commission's own analysis in the NPRM supports the revised approach that we propose. As the Commission noted, the legislative history of CAN-SPAM indicates that an entity is engaged in routine conveyance and does not "initiate" a message when it "simply plays a technical role in transmitting or routing a message and is not involved in coordinating the recipient addresses for the marketing appeal."[22] In light of this legislative history, the NPRM states:

> [I]t seems clear that a seller that simply offers a mechanism on a Web site for forwarding advertising engages in "routine conveyance" when someone other than the seller identifies the recipients or provides their addresses. It seems equally clear, however, that a seller who offers ***payment or other consideration*** to Web site visitors to use a forwarding mechanism encourages visitors to send commercial email to recipients who otherwise would not receive the email. In such cases, the Commission believes that the seller is "involved in coordinating the recipient

[20] This diagram is limited to the forward-to-a-friend context. Of course, the fact that a message is only induced (and no consideration has been paid) does not by itself establish routine conveyance. Instead, the specific criteria of the definition of "routine conveyance" set forth above must be met.

[21] If the interpretation suggested in the NPRM were to be adopted, it would still leave a great deal of uncertainty as to what is would be covered by the Act and what would not. For example, a plain link that merely says "e-mail to a friend" would presumably not be covered. But what if an exclamation point were added? What if it were presented in a bright red font that called attention to it? What if it said "e-mail to a friend now"? The permutations are endless, but it is unclear on which side of the proposed line any of these examples would fall – and why, as a policy matter, there should be any distinction among them.

[22] 70 Fed. Reg. at 25442 (quoting S. Rep. 108-102, at 15).

addresses for the marketing appeal." Such a seller would not be entitled to avail itself of the "routine conveyance" exception to "initiate."[23]

Thus, the Commission acknowledges that: (1) simply putting a forward-to-a-friend feature on a web site constitutes "routine conveyance" and therefore does not make the seller a "sender" of forwarded mail, and (2) there is a relevant distinction between situations that involve consideration and those that do not. This determination fits the plain language of the statute quoted above – providing actual consideration would likely constitute action beyond the scope of routine conveyance and within the ambit of "coordinating the recipient addresses for the marketing appeal," but the mere use of encouraging words would not.

The purpose of the Act – and overarching public policy concerns – also support this revised analysis. The Statement of Congressional Findings and Policy in the Act makes clear that CAN-SPAM was enacted to address the problems posed by the tremendous increase in unwanted and unsolicited commercial e-mail – e-mail sent by commercial entities promoting commercial products and services.[24] But forward-to-a-friend e-mails – especially where no consideration is involved – are consumer-to-consumer messages, which are far outside the scope of the Act. Any restrictions on these e-mails would impose a needless barrier on the ability of recipients to communicate with their friends by electronic mail – and one that would be completely ineffective anyway, because the individual consumer could simply forward the message using functionality on his or her web browser or e-mail program, rather than the one provided by the seller.[25] Recipients who choose to forward commercial e-mail to their friends without receiving any consideration are not acting as commercial agents of the underlying seller – as the Proposed Rule presupposes – but rather as private consumers. Restricting consumer speech in the name of consumer protection – particularly in a manner that imposes arbitrary and pragmatically meaningless distinctions – is contrary to the purpose of the Act.

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[23] 70 Fed. Reg. at 25442 (emphasis supplied).

[24] *See generally* 15 U.S.C. § 7701.

[25] For two reasons, the concern of commenters cited in the NPRM that forward-to-a-friend campaigns may violate the privacy rights of consumers who have opted out of commercial e-mail from the underlying seller is not compelling. First, a consumer who has opted out of receiving commercial e-mail from a particular entity certainly would not expect that his or her friends could not, voluntarily and without receiving any consideration, forward information about that entity at their sole discretion. An opt-out of commercial e-mail from a particular seller surely does not constitute the right to be free from ever seeing any of that seller's advertising material in any context – especially in personal communications from a friend. In the forward-to-a-friend context, the seller neither sends commercial e-mail to the individual who has opted out nor targets that individual for distribution through an agent. The decision to forward the e-mail to that individual is entirely left to the individual user of the forward-to-a-friend feature. Second, because the friend could forward the e-mail using that functionality in the person's web browser or e-mail software – and not through the mechanism offered by the seller – the Rule creates a distinction without a difference. Placing limitations on these messages would therefore have only a *de minimis* impact on consumer privacy while significantly burdening legitimate businesses.

We therefore urge the Commission to clarify that merely offering "inducement" other than actual consideration – such as encouraging words on a website – does not take the seller outside the scope of the "routine conveyance" exception with respect to forward-to-a-friend messages.

V. CONCLUSION

Microsoft appreciates the opportunity to provide these comments to assist the Commission with implementing the CAN-SPAM Act. We urge the Commission to develop rules that are consistent with consumer expectations; enhance individual choice; avoid excessive and unnecessary burdens on legitimate and law abiding senders of e-mail; and provide clear guidance to companies that want to act responsibly. We are committed to tackling spam on behalf of our customers and look forward to working with the Commission toward this common goal.

Sincerely,

Michael Hintze
Senior Attorney
Microsoft Corporation